**MOH CHUAN PIN**

**v.**

**PP**

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: R-05-36-2003]
15 DECEMBER 2008

***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Circumstantial evidence - Totality of evidence - Allegations of prejudice arising from voire dire - Misdirection - Standard of proof - Whether case established beyond reasonable doubt*

***EVIDENCE:*** *Circumstantial evidence - Murder - Securing conviction on - Standard of proof - Combination of circumstances - Totality of evidence*

***EVIDENCE:*** *Standard of proof - Beyond reasonable doubt - Whether there was misdirection due to non-direction - Failure by accused to rebut prosecution's evidence*

***CRIMINAL PROCEDURE:*** *Trial - Misdirection - Standard of proof - Non-direction - Failure by accused to rebut prosecution's evidence - Whether case established beyond reasonable doubt*

***CRIMINAL PROCEDURE:*** *Trial - Voire dire - Allegations of prejudice - Statement allegedly made by accused - Whether knowledge of statement prejudiced trial judge's mind*

This was an appeal by the appellant/accused against the decision of the High Court convicting him of the murder of the deceased and imposing the mandatory death sentence pursuant to s. 302 of the Penal Code upon him. The deceased worked in a shop dealing in the business of selling telecommunication equipment, including cell phones. On the material date, she was found alive but bleeding in the shop and although taken to a hospital, eventually succumbed to her injuries. The accused was seen running out of the shop with blood dripping from his left hand. The accused was chased and although he jumped into a river, climbed up again and continued to run away, he was finally apprehended at a bridge. The appeal was based on the following grounds: (i) the entire

prosecution's case rested on circumstantial evidence and the prosecution had failed to discharge the heavy onus upon it. Counsel for the accused referred to the failure to adduce the best available evidence to link the accused. It was also averred that no attempts were made to trace the accused's fingerprints on the knife that was alleged to have been the weapon used to inflict the injuries on the deceased. Together with this was alleged the failure to trace the bloodstains on the accused's clothes; (ii) the trial judge had erred in placing reliance on the accused's conduct of running away. Combined with this was the submission that such fact, which could give rise to a presumption of guilt, was equally consistent with innocence; and (iii) a trial within a trial (or a proceeding in *'voire dire'*) had been conducted during the stage of the defence case. It was alleged that since the judge had sight of ID32, a statement alleged to have been made by the accused, there was an error that had prejudiced the judge's mind. The judge had misdirected himself on the standard of proof required for the defence in that he had failed to rule that the defence had not raised a reasonable doubt on the prosecution's case. This error had been described as a misdirection due to a non-direction.

**Held (dismissing the appeal, and affirming the conviction and sentence imposed)**

**Per Heliliah Mohd Yusof JCA delivering the judgment of the court:**

**(1)** It was undisputed that the entire case for the prosecution rested on circumstantial evidence. There was no one who actually saw the accused stab the deceased at the shop. However, the judge had, on the facts, detailed the evidence that he found to have established "the combination of circumstances" which, in its totality, pointed to the single conclusion that the accused was the person who had committed the offence. The arguments regarding the absence of evidence linking the knife to the accused and the lack of fingerprint evidence were found to be spurious, likewise with regards to the blood samples. It was in evidence that the accused's conduct of jumping into the river in itself had reduced the possibility of conducting a proper blood analysis on his clothes as well as the evidence of the traces of blood on his own person. This dispelled the contention that a misdirection had transpired allegedly on the ground of non-

direction on the standard of proof. The judge had stated that the prosecution had been able to establish a case that was beyond reasonable doubt. Implicit in this statement was that the accused had failed to discharge his own evidential burden of rebutting the prosecution's evidence. There was nothing in his formulation that amounted to a misdirection, let alone anything prejudicial to the accused. (paras 12, 18, 19 & 20)

**(2)** The issue had really whittled down to the alleged prejudice arising from the voire dire conducted by the judge purportedly for having read the contents of ID32. It is worthwhile to state that the purpose of admitting an erstwhile contradictory statement of an accused is to establish that his evidence is not trustworthy. In the present appeal it was clear on the facts that the judge, having dealt with the issue of admissibility of ID32, clearly displayed that he had put whatever statements out of his mind. He continued to consider the evidence of the accused in the light of the *prima facie* case adduced by the prosecution. *Krishnan & Anor v. PP* (refd). (paras 21 & 26)

**(3)** For the reasons as stated above, this appeal had no merits. (para 27)

***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh perayu/tertuduh terhadap keputusan Mahkamah Tinggi menyabitkannya atas pembunuhan si mati dan mengenakan hukuman mati mandatori mengikut s. 302 Kanun Keseksaan ke atasnya. Si mati bekerja di sebuah kedai yang menjalankan perniagaan menjual barang-barang telekomunikasi, termasuk talipon bimbit. Pada hari material itu, beliau telah dijumpai dalam keadaan hidup tetapi berdarah di kedai itu dan walaupun dibawa ke hospital, akhirnya mati akibat kecederaannya. Tertuduh dilihat berlari keluar dari kedai itu dengan tangan kirinya menitiskan darah. Tertuduh dikejar dan walaupun beliau melompat dalam sebuah sungai, memanjat keluar sekali lagi dan terus lari lagi, beliau akhirnya telah ditahan di sebuah jambatan. Rayuan ini berdasarkan alasan-alasan yang berikut: (i) keseluruhan kes pendakwaan bergantung kepada keterangan ikut keadaan dan pendakwaan telah gagal membuktikan tanggungjawab berat yang terletak atasnya. Peguam tertuduh merujuk kepada kegagalan mengemukakan keterangan paling bagus yang ada untuk mengaitkan tertuduh. Ia juga dihujahkan bahawa tidak ada apa-apa percubaan dibuat untuk mengesan cap jari tertuduh pada pisau

yang dikatakan ialah senjata yang telah digunakan untuk mengenakan kecederaan atas si mati. Bersama ini pengataan dibuat bahawa terdapat kegagalan untuk mengesan kesan darah pada pakaian tertuduh; (ii) hakim perbicaraan telah khilaf apabila bergantung pada kelakuan tertuduh melarikan diri. Bersama ini dihujahkan bahawa fakta sebegitu, yang boleh membangkitkan anggapan bersalah, adalah sama-sama konsisten dengan ketakbersalahan; dan (iii) suatu perbicaraan dalam perbicaraan (atau suatu prosiding dalam '*voire dire*') telah dijalankan semasa peringkat kes pembelaan. Ia dikatakan bahawa oleh kerana hakim telah nampak ID32, satu pernyataan yang dikatakan telah dibuat oleh tertuduh, terdapat sesuatu kekhilafan yang telah memprejudiskan fikiran hakim. Hakim telah menyalaharahkan dirinya atas tahap bukti yang diperlukan untuk pembelaan di mana beliau telah gagal memutuskan bahawa pembelaan tidak membangkitkan keraguan munasabah atas kes pendakwaan. Kekhilafan ini telah diterangkan sebagai suatu salah arahan yang disebabkan oleh suatu ketidak arahan.

**Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman yang dikenakan)**
**Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:**

**(1)** Ia tidak dipertikaikan bahawa keseluruhan kes untuk pendakwaan bergantung kepada keterangan ikut keadaan. Tidak ada sesiapun yang telah nampak tertuduh menikam si mati di kedai itu. Walau bagaimanapun, hakim telah, atas fakta-fakta, memberi penerangan yang terperinci mengenai keterangan yang beliau menjumpai yang dapat membuktikan "penggabungan keadaan-keadaan" yang, dalam keseluruhannya, tunjuk ke simpulan tunggal bahawa tertuduh ialah orang yang telah melakukan kesalahan itu. Hujahan-hujahan berkenaan dengan ketiadaan keterangan yang mengaitkan pisau itu kepada tertuduh dan ketiadaan keterangan cap jari telah didapati tidak betul, begitu juga berkaitan dengan sampel darah. Ia dalam keterangan bahawa kelakuan perayu melompat dalam sungai dengan sendirinya telah mengurangkan kemungkinan melakukan satu analisis darah yang betul atas pakaiannya dan juga keterangan kesan-kesan darah pada badannya sendiri. Ini menghilangkan hujahan bahawa satu salah arahan telah dikatakan berlaku atas alasan ketidak arahan atas tahap bukti. Hakim telah menyatakan bahawa pendakwaan telah berjaya

membuktikan satu kes yang melampaui keraguan munasabah. Tersirat dalam pernyataan ini ialah bahawa tertuduh gagal membuktikan beban keterangan sendirinya untuk mematahkan keterangan pendakwaan. Tidak ada apa-apa dalam formulasi beliau yang menjadikannya suatu salah arahan, lebih-lebih lagi sesuatu yang memprejudiskan tertuduh.

**(2)** Isu ini telah dikurangkan kepada prejudis yang dikatakan berbangkit dari *voire dire* yang telah dijalankan oleh hakim kerana telah membaca kandungan ID32. Ia berfaedah untuk menyatakan bahawa tujuan menerima suatu pernyataan dahulu seorang tertuduh yang bercanggah ialah untuk membuktikan bahawa keterangannya tidak boleh dipercayai. Dalam rayuan semasa ia adalah jelas atas fakta-fakta bahawa hakim, setelah menyelesaikan isu kebolehterimaan ID32, jelas menunjukkan bahawa beliau telah meletakkan apa-apa pernyataan di luar fikirannya. Beliau meneruskan dengan penimbangan keterangan tertuduh memandangkan kes *prima facie* yang dikemukakan oleh pendakwaan. *Krishnan & Anor v. PP* (dirujuk).

**(3)** Bagi sebab-sebab yang dinyatakan di atas, rayuan ini tiada merit.

**Case(s) referred to:**
*Krishnan & Anor v. Public Prosecutor [1981] 2 MLJ 121* ***(refd)***
*Mohd Abbas Danus Baksan v. PP [2006] 3 CLJ 880 CA* ***(refd)***
*Regina v. Exall 4F & F922* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, s. 27
Penal Code, s. 302

*For the appellant - Jagdeep Singh Deo RSN Rayer; M/s Karpal Singh & Co*
*For the respondent - Wong Chiang Kiat DPP*

*[Appeal from High Court, Kangar; Criminal Trial No: 45-02-2001]*

*Reported by Suresh Nathan*

A

## JUDGMENT

**Heliliah Mohd Yusof JCA:**

**[1]** In this criminal appeal the charge preferred against the appellant reads as follows:

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> Bahawa kamu pada 30/4/2001, jam lebih kurang 3.00 petang, di dalam Kedai Sri Mega Communication, No. 2D, Jalan Kangar, di dalam Daerah Kangar, di dalam Negeri Perlis, dengan niat telah melakukan kesalahan bunuh, menyebabkan kematian ke atas NOR AYANTI BINTI MAT RADZI KP: 810322-09-5052 dengan cara menikamnya dengan sebilah pisau lalu menyebabkan kematian, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

C

**[2]** The learned trial judge at the end of the trial convicted the appellant and accordingly imposed the mandatory death sentence pursuant to s. 302 of the Penal Code. The facts of the case are as follows.

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**[3]** The victim (deceased) was in the employment of SP13 the proprietor of Kedai Sri Mega Communication dealing in the business of selling telecommunication equipment including cell phones. On the material date that is 30 April 2001 SP8 the father of SP13, who also assists in operating the business, was returning to the shop between 2.30 and 2.40pm. Upon his arrival at the shop SP8 saw three persons whom he identified as the victim, SP9 and the accused. SP9 then left. SP8 then inquired whether the accused wanted to purchase any item and the reply was that he wanted to purchase a cell phone. In addition SP8 gave evidence that the accused had attempted to borrow his motor cycle purportedly to look for a friend. As the accused was a stranger SP8 refused the request but offered instead his assistance to look for the friend after having been furnished some details. SP8 then left the shop.

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**[4]** SP10 was the witness who was working at a shop next to the premises where the deceased was killed. At about 3pm SP10 heard a muffled sound of a lady screaming. However when he ran to the shop next door he could not gain access as the door of the shop was locked but he stated that he saw someone crouching behind the door. Since he could not gain entry into the shop through that door he sought the help of a friend SP11 to keep watch whether anyone would leave the shop.

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**[5]** SP11 then saw a male figure in black attire and short trousers running out of the shop with blood dripping from his left hand whom SP11 identified as the accused. The accused was seen running away. SP9 was the witness who was working in his motor cycle shop saw someone running into his shop, knocked into a motor cycle and then continued running away. He thought the person looked familiar. SP9 and his colleague SP12 gave chase. SP9 also saw that the person who was running was covered with blood.

**[6]** The accused whom SP9 saw running away was seen jumping into the river and climbing up again. When SP12 tried to stop him he was pushed away and that person continued to run away with SP12 giving chase. The accused was finally apprehended by SP15 at a bridge. The deceased who was then alive was found in the shop lying on her back bleeding and was taken to the hospital. She succumbed to the injuries that she had sustained. Her death was attributed to hypovolemic shock due to haemorrhaging from her right lung, kidney and liver. SP7 stated the cause of death as follows:

> Punca-punca kematian disebabkan oleh hypovolemic shock disebabkan oleh pendarahan dari paru-paru sebelah kanan dari hati, buah pinggang sebelah kanan dan usus kecil.

**[7]** This appeal is broadly based on the following grounds:

(i) The entire prosecution's case rests on circumstantial evidence and the prosecution has failed to discharge the heavy onus upon it. Learned counsel for the appellant referred to the failure to adduce the best available evidence to link the appellant. It was also averred that no attempts were made to trace the finger prints of the appellant on P9 that is the knife which was the weapon alleged to have been used to inflict the injuries on the deceased. Together with this was alleged the failure to trace blood stains on the appellant's clothes.

(ii) The trial judge has erred in placing reliance on the conduct of the accused running away. Combined with this is the submission that such fact, which could give rise to a presumption of guilt was equally consistent with innocence.

(iii) A trial within a trial (or a proceeding in *'voire dire'*) had been conducted during the stage of the defence case. It is alleged that since the judge had sight of ID32, the statement alleged to have been made by the appellant, there was an error which had prejudiced the mind of the trial judge. The trial judge has misdirected himself on the standard of proof required for the defence in that he had failed to rule that the defence had failed to raise a reasonable doubt on the prosecution's case. This error has been described as a misdirection due to a non direction.

**[8]** It is not disputed by both the learned deputy public prosecutor and the counsel for the appellant that the entire case for the prosecution rests on circumstantial evidence. *Regina v. Exall* 4F & F922 (at p 923) is found to be relevant wherein stated Pollock CB, *inter alia*,:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength.
>
> Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

**[9]** Grounds (i) and (ii) of this appeal are however closely intertwined. The records in this appeal disclose that the trial judge after having given detailed consideration to the evidence of the witnesses and having addressed several material particulars made a ruling at the end of the case of the prosecution with reasons furnished. Additionally it is also noted that when defence was called, the trial judge also made another ruling with further reasons.

**[10]** The rulings made by the trial judge are to be given due attention in view of the infirmities that are alleged not only in respect of the prosecution's case resting on circumstantial evidence but also an alleged error on the part of the trial judge in dealing

with the standard of proof. The rulings made at the end of the prosecutions as well as the case of the defence dwelt on material findings of facts relevant to the case.

**[11]** It is further noted that the trial judge had ruled as inadmissible certain statements made by the accused while under custody. In rejecting its admissibility careful consideration had been made on the application of s. 27 of the Evidence Act 1950 which in our view was properly done and henceforth needs no further attention for the purpose of this appeal.

**[12]** In his grounds of judgment, the trial judge had phrased the following question:

> Dalam kes ini tiada saksi yang melihat orang yang mencederakan mangsa di tempat kejadian itu. Dengan yang demikian pihak pendakwaan perlu bergantung kepada keterangan ikut keadaan untuk membuktikan mangsa telah dicederakan oleh tertuduh. Apakah keterangan ikut keadaan yang ada?.

**[13]** This observation should also be appraised in the light of the evidence that had been adduced by SP8, SP9, SP10, SP11, SP12. In the shop's premises was retrieved a watch which was positively identified by SP9 to be the watch that he had seen being worn by the accused at the time he saw him in the shop before the tragic events took place. SP15 who had apprehended the accused at the bridge found two cell phones P16A and B in the left pocket trousers worn by the accused. SP13 the owner of the premises where the deceased was stabbed had discovered two cell phones from his shop missing. The two missing cell phones were P16A and B namely the same cell phones found on the person of the accused.

**[14]** The trial judge at the end of the prosecution's case also noted:

> Orang Kena Tuduh dibawa ke Hospital Kangar untuk rawatan pada 2.5.2001 oleh polis dan dia dirawat oleh SP14 Dr. Chong Choong Fook. SP14 mendapati Orang Kena Tuduh mengalami calar-calar luaran (superficial) sahaja dan tidak dalam di pergelangan tangan kiri dan ibu jari kiri. Bahagian lain badan Orang Kena Tuduh tiada kesan cedera. SP14 berpendapat kecederaan calar ini mungkin disebabkan terguris dengan benda yang tajam seperti pisau atau kaca.

Itulah keterangan ikut keadaan penting yang telah dikemukakan oleh pihak pendakwaan. Saya sedar tentang kedudukan undang-undang berkaitan keterangan ikut keadaan iaitu 'where circumstancial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion the guilty of the accused' (lihat *Dato' Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232).

Saya menerima keterangan SP9 bahawa P12 yang dijumpai di tempat kejadian adalah jam tangan Orang Kena Tuduh.

Berdasarkan keterangan-keterangan yang ada saya berpuas hati bahawa tiada orang lain keluar dari kedai tempat kejadian itu selain Orang Kena Tuduh dari waktu SP10 nampak satu bayang lelaki dalam kedai tersebut selepas dia pergi menyiasat apabila mendengar jeritan perempuan dari dalam kedai itu sehingga waktu SP11 nampak Orang Kena Tuduh lari keluar dari kedai itu. Pintu belakang kedai tersebut dikunci dengan mangga.

Saya juga menerima keterangan pihak pendakwa bahawa SP15 telah menjumpai P16A dan B iaitu dua buah handphone daripada Orang Kena Tuduh semasa dia membuat pemeriksaan badan Orang Kena Tuduh dan P16A dan B adalah dimiliki oleh SP13 dan disimpan dalam almari pameran di kedai tersebut dan belum dijual kepada mana-mana pelanggan.

Saya berpendapat tidak munasabah alasan Orang Kena Tuduh bahawa dia hendak tolong orang kerana kalau dia hendak tolong orang kenapa dia lari keluar dari kedai tersebut dengan meninggalkan mangsa yang cedera parah dan kenapa dia tidak meminta bantuan daripada SP11 yang berada di luar kedai.

Saya juga tidak bersetuju dengan cadangan peguambela bahawa Orang Kena Tuduh terus lari apabila dikejar oleh SP9 dan SP12 kerana SP9 membawa besi paip. Kalau begitu kenapakah selepas Orang Kena Tuduh berada bersama SP12 semasa di tepi sungai Orang Kena Tuduh melarikan diri dari SP12.

Saya bersetuju dengan hujah Timbalan Pendakwa Raya bahawa tindakan Orang Kena Tuduh yang lari keluar dari kedai tersebut dengan tergesa-gesa tanpa memakai kasut dalam keadaan darah menitik dan kemudian terjun ke dalam sungai mencuci kesan darah serta melarikan diri setelah SP10 memberitahu SP12 yang dia hendak ke balai polis menunjukkan tingkah laku Orang Kena Tuduh bersalah. Keterangan-keterangan ini adalah relevan menurut Seksyen 8 Akta Keterangan.

Setelah menimbang segala keterangan-keterangan ikut keadaan yang ada seperti dinyatakan di atas secara keseluruhannya saya berpuas hati bahawa keterangan-keterangan tersebut menjuruskan kepada hanya satu kesimpulan (only one irresistible conclusion) bahawa Orang Kena Tuduhlah orang yang menikam mangsa dengan pisau itu iaitu P9.

Untuk melengkapkan pertuduhan ini pihak pendakwaan perlulah juga membuktikan unsur ketiga kesalahan ini iaitu Orang Kena Tuduh melakukan kecederaan-kecederaan tersebut dengan niat untuk menyebabkan kematian mangsa ataupun ianya dilakukan dengan niat untuk menyebabkan kecederaan yang Orang Kena Tuduh tahu berkemungkinan menyebabkan kematian atau mencukupi dalam keadaan biasanya menyebabkan kematian. Sehubungan dengan perkara ini saya mengambil pandangan yang diberikan oleh Thomson CJ dalam kes *Tan Buck Tee v. PP* [1961] MLJ 176 pada muka surat 179:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver; which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

Begitu juga dengan kes di hadapan Mahkamah ini. Kecederaan-kecederaan yang dialami oleh mangsa adalah begitu serius seperti diberitahu oleh SP7 terutamanya kecederaan parah kepada paru-paru sebelah kanan, bahagian kanan hati mangsa dan luka di buah pinggang sebelah kanan. Menurut SP7 mana-mana satu kecederaan kepada organ-organ yang penting ini boleh menyebabkan kematian. Berdasarkan kepada kecederaan-kecederaan tersebut Mahkamah boleh membuat inferens tentang niat Orang Kena Tuduh untuk membunuh mangsa.

Oleh yang demikian di akhir kes pendakwaan saya berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap Orang Kena Tuduh ke atas pertuduhan yang dikenakan terhadap Orang Kena Tuduh. Dengan itu saya memanggil Orang Kena Tuduh mengemukakan pembelaannya terhadap pertuduhan tersebut.

**[15]** In *Mohd Abbas bin Mohd Abbas Danus Baksan v. PP* [2006] 3 CLJ 880 this court has reiterated as follows:

A Now, it is true that the evidence for the prosecution was largely, if not wholly, circumstantial. And it is learned counsel's complaint that the learned judicial commissioner failed to direct himself that for an accused to be convicted on the basis of circumstantial evidence. With respect, we find no merit in this criticism. In
B *Mohd Affandi bin Abdul Rahman & Anor v. Public Prosecutor* [1998] 2 CLJ 383 this court said:

> We do not consider that any particular form of words is necessary to convey to the minds of the jury the burden that lies upon the prosecution when it relies on
C circumstantial evidence to establish its case. The proposition that circumstantial evidence must, when taken together, irresistibly lead to the conclusion that the accused committed the offence is merely another way of saying that the prosecution must prove its case beyond a reasonable doubt. This is because any gap in the circumstances relied upon
D or an interpretation of them that reasonably leads to an alternative conclusion inconsistent with guilt would result in the prosecution not having proved its case beyond a reasonable doubt, (see *Jayaraman & Ors v. Public Prosecutor* [1981] 1 LNS 129.

E Having regard to the evaluation made by the learned trial judge we fail to see in what manner it could be said that he had not applied his mind to a proper evaluation of the evidence in the case in order to attain a finding that a *prima facie* case had been
F established.

**[16]** We now turn to his consideration of the case for the defence. The case for the defence briefly showed that the accused gave a different version of what transpired after SP8 left the shop. The accused in his evidence stated that he had gone to the shop
G to buy a cell phone but he only had RM300 in his possession to purchase a second hand unit. He was also waiting for a friend from whom he could borrow more money to purchase a new phone. His version was that due to stomach pains he had requested the use of the toilet in the shop and whilst in there he
H heard the sound of a scream and glass breaking. Upon exiting the toilet he found the victim lying downwards. He alleged that he stumbled as there was blood on the floor. He had turned the body over and had wiped off blood from the victim's face. He had run out of fear leaving behind his footwear. He was given chase
I by two persons and he had told SP9 and SP12 that he was

attempting to save a life and he had jumped into the river with intent to swim across. He was told by SP12 to climb out of the river and upon approaching SP12 he was knocked and hit by SP12 and hence incurred injuries on his head. The version of the accused with regard to P16A and B the two cell phones also differed. This version was that he had seen SP19 taking the two items from the shop where he had been taken to and that SP19 had placed them in a plastic bag. He also denied that P12 the watch belonged to him.

**[17]** It is now incumbent to refer to relevant parts of the trial judge's findings at the end of the case for the defence in the light of the challenge mounted by counsel for the defence that the trial judge had failed to consider the burden of proof at the end of the case for the defence. Again in examining the reason given by the judge we are of the view that a carefully considered evaluation had been given of the case adduced by the defence to rebut the prosecution's case and warrants a verbatim reference as follows:

> Dalam penghujahannya di akhir kes peguambela Tertuduh telah berhujah antara lainnya bahawa *Tertuduh telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan atas alasan-alasan berikut.* Pertamanya tidak ada kesan cap jari Tertuduh di atas pisau (P9) yang digunakan dalam kejadian tersebut dan pihak polis tidak menjalankan siasatan untuk mendapat apa-apa kesan cap jari di atas pisau tersebut. Keduanya tidak ada kesan darah Tertuduh di kesan dalam kedai tersebut walaupun pihak pendakwaan mendakwa bahawa kecederaan kepada tangan Tertuduh adalah disebabkan Tertuduh memecahkan almari kaca untuk pameran telefon-telefon bimbit tersebut. Ketiganya tidak ada bukti untuk menunjukkan bahawa pakaian yang dipakai oleh mangsa ada kesan darah Tertuduh. Oleh yang demikian, menurut peguambela Tertuduh, cerita Tertuduh bahawa dia berada dalam tandas kedai tersebut semasa mangsa diserang adalah munasabah dan bukan sesuatu cerita yang direkakan kemudiannya (afterthought). Beliau juga berhujah bahawa penjelasan Tertuduh bahawa dia lari dari kedai tersebut kerana takut setelah melihat mangsa berdarah adalah munasabah.
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> Dalam hujah balasnya Timbalan Pendakwa Raya telah berhujah antara lainnya bahawa keterangan Tertuduh bahawa dia pergi ke kedai tersebut untuk membeli telefon bimbit dengan membawa wang tunai RM300.00 adalah rekaan Tertuduh sahaja kerana tiada wang tunai diperolehi daripada Tertuduh semasa SP16 menahannya. Kecederaan kepada tangan Tertuduh adalah selari

dengan akibat dia terkena kaca sebagaimana dinyatakan oleh SP14, Dr. Chong Choong Fook, dan bukan seperti didakwa oleh Tertuduh bahawa kecederaan itu disebabkan dia dipukul oleh SP12 dan semasa dia ditahan di bawah pokok.

*Seterusnya Timbalan Pendakwa Raya berhujah bahawa cerita Tertuduh bahawa dia berada di dalam tandas semasa mangsa diserang adalah satu rekaan sahaja. Ini kerana Tertuduh tidak memaklumkan kepada SP19, pegawai penyiasat kes ini, bahawa dia berada di dalam tandas pada masa tersebut. Lagipun SP13, pemilik kedai tersebut, telah memberitahu Mahkamah bahawa orang lain tidak dibenarkan untuk menggunakan tandas tersebut.* Jikalau orang lain yang mencederakan mangsa kenapa Tertuduh perlu lari tergesa-gesa meninggalkan kedai tersebut. Perbuatannya ini tidak konsisten dengan apa yang Tertuduh beritahu kepada SP9 dan SP12 semasa dia dikejar oleh mereka bahawa dia hendak menolong orang.

Mengenai dakwaan Tertuduh bahawa kedua-dua telefon bimbit tersebut iaitu P16A dan B diambil oleh SP19 di tempat kejadian dan bukan ditemui daripada poket seluarnya Timbalan Pendakwa Raya berhujah ianya sama sekali bercanggah dengan keterangan SP15 dan SP16 serta SP13 dan tidak patut diterima oleh Mahkamah.

*Mengenai isu tiada kesan cap jari pada pisau tersebut yang telah dibangkitkan oleh peguambela Tertuduh Timbalan Pendakwa Raya telah berhujah bahawa ia tidak menjejaskan kes pendakwaan dan tidak menimbulkan apa-apa keraguan ke atas kes pendakwaan.* Begitu juga dengan ketiadaan bukti tentang kesan darah simati di dalam kedai tersebut dan pada pakaian simati.

Dalam menimbang sama ada keterangan Tertuduh telah menimbulkan apa-apa keraguan terhadap kes pendakwaan Mahkamah perlu menimbang keterangan yang dikemukakan oleh pihak pembelaan secara keseluruhan bersama-sama dengan keterangan-keterangan pihak pendakwaan.

*Daripada pembelaan Tertuduh adalah jelas bahawa orang lain yang telah mencederakan mangsa semasa Tertuduh berada di dalam tandas kedai tersebut. Di akhir kes saya masih berpendapat pihak pendakwaan telah berjaya membuktikan tanpa keraguan yang munasabah bahawa tiada orang lain yang masuk ke dalam kedai tersebut dari waktu SP8 meninggalkan kedai tersebut sehingga waktu SP11 nampak Tertuduh lari keluar dari kedai tersebut. Di samping itu tindakan Tertuduh berlari keluar tergesa-gesa dari kedai tersebut dan 2 buah telefon bimbit iaitu P16A dan B dari kedai tersebut dijumpai dalam poket Tertuduh*

*serta tiada wang tunai sebanyak RM300.00 dijumpai daripada Tertuduh menunjukkan keterangan Tertuduh hanyalah satu rekaan sahaja.* Tertuduh tidak memaklumkan perkara tersebut kepada SP19 dan SP13 iaitu pemilik kedai tersebut telah mengatakan orang lain tidak dibenarkan menggunakan tandas tersebut. Saya juga tidak menerima keterangan Tertuduh tentang bagaimana kecederaan ke atas tangan kirinya bahawa ia disebabkan dia terjatuh semasa dia dipukul. Saya menerima keterangan SP14, Dr. Chong Choong Fook tentang bagaimana kecederaan tersebut berlaku iaitu kecederaan sedemikian boleh disebabkan kaca dan beliau tidak bersetuju bahawa kecederaan sedemikian boleh disebabkan semasa Tertuduh terjatuh. Versi pihak pendakwaan tentang bagaimana kecederaan tersebut berlaku disokong dengan fakta bahawa 2 buah telefon bimbit yang sebelum itu disimpan dalam almari kaca di dalam kedai tersebut telah ditemui dari poket seluar Tertuduh. Keterangan Tertuduh bahawa SP19 yang mengambil kedua-dua telefon bimbit itu dari tempat kejadian adalah tidak munasabah. *Pada pendapat saya ketiadaan cap jari pada pisau P9 yang telah disahkan digunakan untuk menikam simati dan tiada keterangan tentang kesan darah Tertuduh pada pakaian mangsa atau dalam kedai tersebut tidak juga menimbulkan keraguan kepada kes pendakwaan yang mempunyai keterangan-keterangan yang kukuh (over whelming) terhadap Tertuduh.*

Saya juga bersetuju dengan hujah Timbalan Pendakwa Raya bahawa keterangan Tertuduh juga tidak menimbulkan sebarang pembelaan yang membolehkan Mahkamah memutuskan bahawa Tertuduh telah melakukan kesalahan yang lebih ringan daripada kesalahan dia dipertuduhkan itu.

*Berdasarkan kepada alasan-alasan di atas saya berpendapat pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan yang munasabah terhadap Tertuduh.* Oleh itu Mahkamah mendapati Tertuduh bersalah dan dengan yang demikian Tertuduh disabitkan dengan kesalahan seperti pertuduhan. (emphasis added)

**[18]** In summary it is found that the judge has detailed the evidence which he found to have established "the combination of circumstances" which in its totality points to the single conclusion that the accused is the person who has committed the offence. The arguments regarding the absence of evidence linking the knife to the accused and the lack of finger prints evidence are found to be spurious likewise with regards to blood samples. It is in evidence that the conduct in jumping into the river in itself had reduced the possibility of conducting proper blood analysis on his clothes as well as evidence of traces of blood on his own person.

**[19]** The above statement of the judge is extracted verbatim to dispel the contention that misdirection has transpired allegedly on the ground of non direction on the standard of proof.

**[20]** The trial judge has stated that the prosecution has been able to establish a case that is beyond reasonable doubt. Implicit in this statement is that the accused has failed to discharge his own evidential burden of rebutting the evidence of the prosecution. We do not discern anything in his formulation that amounts to a misdirection leave alone anything prejudicial to the accused.

**[21]** The issue has really whittled down to the alleged prejudice arising from the *voire dire* conducted by the trial judge purportedly for having read the contents of ID32.

**[22]** At the defence stage the prosecution in cross examination had posed questions to the accused concerning his presence in the shop, his conduct of running away and sought his reasons for doing so, as well as several other questions touching on the material particulars of the case of the prosecution. The defence case comprised denials and presenting his own version to explain his presence in the shop and the finding of the two cell phones in his possession after he had been arrested by PW15. It was at the end of cross examination of the accused at the defence stage that the prosecution applied to introduce a statement recorded pursuant to s. 113 of the Criminal Procedure Code. The defence had resisted this on the ground that the statement was not given voluntarily. The *voire dire* conducted by the trial judge arising from the objection raised by the counsel for the defence was to establish whether the cautioned statement ID32 extracted from the accused was voluntarily rendered. During the trial within a trial the trial judge heard witnesses for the prosecution at the conclusion of which he made a direction that the accused be given an opportunity to call for witnesses. Three witnesses gave evidence, including the accused, for and on behalf of the accused whilst the five witnesses gave evidence for the prosecution. After having heard submissions the trial judge then made the ruling that the prosecution had not succeeded to establish beyond a reasonable doubt that the ID32 had been given voluntarily and consequently, ruled ID32 to be inadmissible. The Criminal Procedure Code does not enunciate a specific procedure to be applied in conducting a trial within a trial. It is observed that the trial judge had adhered properly to the procedural requirements of

ensuring the admissibility of ID32 or otherwise. The challenge mounted here is directed towards an alleged error in the impeachment proceedings which in the words of counsel for the defence "have seriously prejudiced the trial judge's mind as he had seen the contents of the said ID32" which was ruled inadmissible. Counsel for the appellant in the course of this appeal has even undertaken the unusual step of making an oral application for ID32 to be admitted by way of a supplementary record of appeal, an application which we were not inclined to entertain.

**[23]** According to the records it is observed that the trial judge did scrutinize ID32 where he had directed the deputy public prosecutor to mark in red ink the differences between the oral statements of the accused in court and the contents of what were recorded in the cautioned statement.

**[24]** At the conclusion of the case for the defence it is found that the trial judge as reflected in his grounds of judgment had appraised the evidence of the prosecution and the defence in its totality. With regard to the trial within a trial the judge made a reference to it in the following terms:

> Untuk pembelaannya Tertuduh telah memilih untuk memberi keterangan bersumpah setelah Mahkamah menerangkan haknya untuk membuat pembelaan dalam tiga pilihan. Tertuduh tidak memanggil saksi lain untuk kes pembelaannya.
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> ...
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> Di akhir kes perbicaraan dalam perbicaraan tersebut saya telah memutuskan bahawa ID32 tidak boleh diterima sebagai keterangan pihak pendakwaan kerana pihak pendakwaan telah gagal membuktikan bahawa percakapan tersebut telah diberi dengan sukarela. Saya telah pun menyediakan alasan penghakiman yang berasingan mengenai kes perbicaraan dalam perbicaraan ini dan ia boleh didapati di dalam nota prosiding kes ini. Oleh itu tidaklah perlu untuk saya membincang perkara tersebut dengan lebih lanjut di sini.

**[25]** Counsel for the appellant is in essence questioning the method of impeaching the credit. The same argument that the trial judge should not have sight of ID32 before commencing the *voire dire* has been judicially considered much earlier in *Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121. Salleh Abas FJ (as he then was) in delivering the judgment of the court observed (p 123):

During the course of the arguments in this appeal we were referred to *Lim Ba Ba & Anor. v. Public Prosecutor* in which somewhat similar point was raised but with some difference. In *Lim Ba Ba*'s case the prosecution impeached the credit of the accused by using his cautioned statement, recorded under section 37A(i)(b) of the Dangerous Drug Ordinance, which is in *pari materia* to section 113 of the Criminal Procedure Code. The judge trying the case was the same judge who was trying the case under the present appeal. In *Lim Ba Ba*'s case which was tried much later than the present case the learned trial judge did make a finding after holding a 'Trial within a Trial' that the cautioned statement was voluntarily made and therefore admissible. The objection raised by counsel for the accused in that case was that the learned trial judge should not have been shown the inconsistent part of the statement before issue of admissibility was settled with a trial within a trial. The objection was overruled by the learned trial judge and this court agreed with his ruling and so the appeal was dismissed.

The procedure adopted by the learned trial judge in that case as well as in this case was a time-honoured procedure which was laid down by Mr. Justice Taylor in *Muthusamy v. Public Prosecutor.* This procedure has been accepted and consistently followed by courts in this country and we see no reason to depart from it.

One of the methods to impeach the credit of a witness is by proof of his former statement inconsistent with the evidence which is liable to be contradicted. This is enacted by section 155(c) of the Evidence Act, according to which impeachment essentially consists of two elements:

(a) contradicting the witness' evidence; ie, confronting him with the inconsistent statement; and

(b) proof of the statement.

As regards contradicting, the second limb of section 145(1) of the Act requires the party who conducts the impeachment to draw the witness' attention to the inconsistent part of his statement, before confronting him with it. This rule is similar to the provision of section 5 of the Criminal Procedure Act, 1865 of the United Kingdom; its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency. If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted. Thus as a first step it is essential that

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> the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure.

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**[26]** It is worthwhile to state that the purpose of admitting an erstwhile contradictory statement of an accused is for the purpose of establishing that his evidence is not trustworthy. In this appeal it is clear that the trial judge having dealt with the issue of admissibility of ID32 clearly displayed that he had put whatever statements out of his mind. He had demonstrated that having put the issue of ID32 out of the way, he continued to consider the evidence of DW1 the accused in the light of the *prima facie* case adduced by the prosecution.

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**[27]** For the reasons as stated above, we find that this appeal has no merits. The appeal is therefore dismissed. The conviction and sentence imposed are affirmed.

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